Supreme Court, U.S.
FILED
MAR 2 1992
OFFICE OF THE CLERK

No. 91-1212

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

PORTER H. MITCHELL,
*Petitioner,*

v.

MOBIL OIL CORPORATION, et al.,
a New York Corporation,
*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

---

## PETITIONER'S REPLY BRIEF

---

THOMAS L. ROBERTS
(Counsel of Record)
RODNEY R. PATULA
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 S. Syracuse Way, #400
Englewood, CO 80111
Telephone (303) 771-6200
Facsimile (303) 779-0740
*Counsel for Petitioner*
*Porter H. Mitchell*

March 2, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 2

A. The Issue In Question Was Unripe Until *Mitchell II* Was Decided In September 1991 ..... 4

B. The Law Of The Case Doctrine Cannot Be Used As A Shield To Insulate From Review Lower Court Rulings Which Plainly Conflict With Authority Of This Court ..... 7

C. Mobil's Arguments That 28 U.S.C. § 2106 Appellate Jurisdiction Cannot Be Limited By The Rules Of Civil Procedure And That *Neely* Overruled *Cone* Support Grant—Not Denial—Of The Writ ..... 8

CONCLUSION ..... 10

## TABLE OF AUTHORITIES


**CASES:** **Page**

*Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937) .... 37
*Christianson v. Colt Industries*, 486 U.S. 800 (1988) .... 7
*Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212 (1947) .... *passim*
*Fogel v. Chestnutt*, 668 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828, *reh'g denied*, 459 U.S. 1059 (1982) .... 7
*Globe Liquor Co. v. San Roman*, 332 U.S. 571, *reh'g denied*, 333 U.S. 830 (1948) .... *passim*
*Johnson v. New York, N.H. & Htfd. Rd. Co.*, 344 U.S. 48 (1952) .... *passim*
*Johnson v. Zerbst*, 304 U.S. 458 (1938) .... 6
*Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S.Ct. 252 (1990) .... 2, 3, 4, 6
*Mitchell v. Mobil Oil Corp.*, No. 91-1084 (10th Cir. Sept. 18, 1991) .... 2, 6, 7
*Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, *reh'g denied*, 386 U.S. 1027 (1967) .... *passim*

**CONSTITUTION, STATUTES AND RULES:**

Article III of the Constitution .... 8
28 U.S.C. § 1291 .... 8
28 U.S.C. § 2106 .... 8
Fed. R. Civ. P. 50 (1987) .... *passim*

**SECONDARY AUTHORITY:**

Tigar, Michael E., *Federal Appeals Jurisdiction and Practice*, (1991 Cum. Supp.) § 9.11 .... 5

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1212

PORTER H. MITCHELL,

*Petitioner*,

v.

MOBIL OIL CORPORATION, et al.,
a New York Corporation,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITIONER'S REPLY BRIEF

Mobil's Brief in Opposition offers further good reason for granting the writ in this case. If the *Cone-Globe-Johnson* line of authority is still controlling precedent, then the court of appeal's decision directly conflicts with that authority and allows the law of the case doctrine to work a manifest injustice. On the other hand, if *Neely* overruled the *Cone-Globe-Johnson* line, this Court should seize this opportunity to confirm this important principle and remove the restriction on appellate power which every circuit in the federal system has unnecessarily imposed over the last 24 years since *Neely* was decided.

Mobil ignores the issue of federal appellate power presented and diverts attention from it by arguing that the *Mitchell I* panel directed the district court to enter judgment of dismissal for Mobil, despite its failure to file a motion for judgment n.o.v. Only by miscasting the record

in this regard can Mobil fashion its arguments of waiver and preclusion by law of the case. Further, a waiver argument cannot withstand scrutiny in light of the problem presented: a jurisdictional question of raw appellate power. Finally, the law of the case was never intended to allow a court of appeals to act in conflict with binding authority of this Court.

## STATEMENT OF THE CASE

Mobil's "counterstatement" of the case suggests that the first Tenth Circuit panel ordered the trial court to enter judgment for Mobil on remand prior to the filing of the first certiorari petition in this case. That simply never happened. The first time the court of appeals ruled that its opinion and judgment called for outright dismissal of Mitchell's ADEA claims with prejudice was the September 1991 opinion by the second panel, *Mitchell II* (*Petition*, A-1 to A-4).

The *Mitchell I* opinion, 896 F.2d 463, did not direct what relief the trial court was to afford. *Opp. Brief*, SA-17. The judgment merely remanded for "further proceedings" and did not instruct the trial court further. *Petition*, A-7 & A-8. The fact that the first panel found that the trial court's refusal to direct a verdict was error was not equivalent to a direction that judgment enter in favor of Mobil. Direction of a verdict is not tantamount to entry of a judgment. Indeed, that principle is at the heart of the issue presented here. Had the trial court directed a verdict, Mitchell could have requested (before entry of judgment) and the trial court had the discretion to award a nonsuit or new trial in the interests of justice, precisely the important procedural right which a Rule 50(b) motion is designed to protect. Both lower courts have failed to appreciate this crucial procedural right that Mitchell was deprived of when Mobil elected not to file a motion for judgment n.o.v.

Further, "Mitchell's Motion for Clarification of the February 16, 1990 Opinion and Judgment, and Alterna-

tively, Motion to Amend Judgment and Mandate to Expressly Order a New Trial" requested the following relief:

> WHEREFORE, plaintiff-appellee Porter H. Mitchell respectfully requests this Honorable Court *to clarify its prior opinion and judgment* to the effect that remand is with directions *to order a new trial* on Mitchell's ADEA claim *or, in the alternative*, if that was not the intention of this Court, *to modify and amend the opinion and judgment* (and later, fashion the mandate accordingly) *to expressly direct the District Court to order retrial of Mitchell's ADEA claim on remand* if he is unsuccessful in achieving reinstatement of his judgment via a certiorari proceeding with the United States Supreme Court and to afford Mitchell such other and further relief as the Court deems appropriate under the circumstances.

*Petition*, A-12 & A-13 (emphasis added). Mitchell requested the court to clarify its prior opinion and judgment to state that remand was with directions to order a new trial, or alternatively, to amend the opinion and judgment to expressly direct the trial court to order a retrial. The Tenth Circuit did neither. It simply disposed of the motion in one word: "denied." *Petition*, A-14.

In denying this motion without explanation, the Tenth Circuit did not foreclose the trial court from ordering a retrial but simply refused to clarify its nonspecific remand.[1] In the application for extension of time to file the first petition for certiorari, Mitchell stated that he would include the new trial issue in that petition *only* "[i]f the Tenth Circuit determines that Petitioner is not entitled

---

[1] Indeed, the first panel may have felt that clarification was not necessary because it could be assumed that the trial court would, in accordance with the *Cone-Globe-Johnson* rule, order a retrial due to Mobil's decision not to file a Rule 50(b) motion before the *Mitchell I* appeal. Further, one can reasonably infer from the court's refusal to grant the alternative relief that the panel *did intend a retrial* on remand because the alternative relief was necessary *only* if the court did not intend a retrial.

to a new trial on his ADEA claim . . . ." *Opp. Brief*, SA-20. This it simply did not do.

The fact that the Tenth Circuit declined to make that determination rendered the issue unripe for inclusion in the first petition for certiorari—a circumstance brought to this Court's attention on page 1 (footnote 1) of the Petition and reiterated in the Reply Brief. Simply, Mitchell had not yet been denied a retrial.

Whether Mobil was entitled to judgment or merely retrial on remand was never determined by the court of appeals until its September 18, 1991 opinion of which review is now sought. Mobil's suggestion to the contrary is plainly wrong and its insinuation that Mitchell somehow misled this Court on the point regrettable.

**A. The Issue In Question Was Unripe Until *Mitchell II* Was Decided In September 1991.**

Mobil's waiver arguments are unavailing for several reasons and themselves give reason for certiorari review.

First and foremost, insofar as the concept of waiver is an issue in this case, it involves what rights *Mobil* waived in choosing to take its appeal in *Mitchell I* without first filing a motion for judgment n.o.v. in the trial court. This case is *not* about waiver of rights by Mitchell. Rather, the issue is whether Mobil waived and irretrievably lost the right to relief other than a retrial when it chose not to file a Rule 50(b) motion and instead chose to take an immediate appeal. When Mobil elected that strategy, it foreclosed itself from the possibility of receiving a judgment in its favor based upon insufficiency of the evidence according to clear precedent of this Court, and this is so regardless of whether that issue is determined under *Cone-Globe-Johnson* or under *Neely*.

As one of Mobil's counsel of record in this case has recognized in his treatise on appellate practice, the failure to file a Rule 50(b) motion deprives the appellate court

from entering any relief other than a retrial upon a finding of insufficiency of the evidence:

> In *Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212 (1947); again in *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); and also in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), the Court held that when a civil verdict loser fails to renew its motion for directed verdict by a timely motion for judgment notwithstanding the verdict, the court of appeals is *powerless* to order entry of judgment for the verdict loser. If the court is convinced the jury verdict is based on insufficient evidence, its sole remedy in such a case is to remand for a new trial.

Michael E. Tigar, *Federal Appeals Jurisdiction and Practice* (1991 Cum. Supp.) § 9.11 at 98 (Shepard/McGraw Hill) (emphasis added). It was Mobil's failure to file a Rule 50(b) motion that deprived the court of appeals of the power to order judgment of dismissal. Nothing Mitchell did or did not do could fill that void or alter the result of Mobil's choice. To hold otherwise, as this Court has recognized on several occasions, would deprive Mitchell of the important procedural right to move for nonsuit or a new trial if the court granted j.n.o.v. *See* Fed. R. Civ. P. 50(c). Mobil filed no such motion. Mitchell was thus never required to do anything to protect his entitlement to a retrial if judgment was reversed on appeal for insufficiency of the evidence. This is the protection identified and preserved by the *Cone-Globe-Johnson* trilogy.

As also recognized by Mr. Tigar, *Neely* did not change this rationale:

> In *Neely v. Martin K. Eby Construction*, 386 U.S. 317, 328-29 (1967), the Supreme Court said that there is "no ironclad rule" forbidding direction of a judgment for the verdict loser, *provided the other party has a chance to argue that a new trial should be awarded as an alternative.*

*Id.* (emphasis added). The chance that a new trial could be awarded as an alternative to judgment for the verdict loser was present in *Neely* because a motion for judgment n.o.v. was filed in that case. This Court approved an appellate court's order of judgment in *Neely*, not because it decided that a motion for judgment n.o.v. was no longer a strict precondition to such relief (one was filed in *Neely*), but because the verdict winner did not ask for nonsuit or new trial in response to that motion in the trial or appellate court.

As Mobil's counsel has recognized in a nonadversarial context, judgment for the verdict loser based upon insufficiency of evidence can enter *only* if a motion for judgment n.o.v. was filed, thus affording the verdict winner the right to request nonsuit or new trial as an alternative to judgment n.o.v. There was simply nothing for Mitchell to waive once Mobil elected not to file a motion for judgment n.o.v.

Second, as the language of the opinion and judgment in *Mitchell I* and the subsequent motions by Mitchell and the orders disposing of them clearly reveal, the Tenth Circuit never determined, expressly or by implication, that judgment of dismissal (and not retrial) would be required on remand. That determination was never made until the trial court erroneously construed the *Mitchell I* opinion and mandate to require dismissal, a ruling erroneously repeated by a second panel of the Tenth Circuit in *Mitchell II*. Only then was the issue ripe for presentation to this Court, and unripe issues cannot be subject to waiver.

Third, waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Mitchell was attempting to find out what his rights were. How then can it be said that he intentionally relinquished or abandoned a "known" right? Further, "the right of jury trial is fundamental [and] courts indulge every reasonable pre-

sumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (where both parties move for directed verdict, right to jury trial not waived).

In sum, Mobil's "waiver" argument skips the only true waiver in this case—Mobil's waiver of the potential for a defense judgment on remand after reversal of Mitchell's judgment for insufficiency of the evidence when Mobil chose to file no Rule 50(b) motion.

**B. The Law Of The Case Doctrine Cannot Be Used As A Shield To Insulate From Review Lower Rulings Which Plainly Conflict With Authority Of This Court.**

Mobil's law of the case argument is also based on the unfounded assumption that the Tenth Circuit determined, prior to *Mitchell II*, that Mobil was entitled to judgment on remand despite its failure to move for judgment n.o.v. in the trial court. As discussed in the Petition and earlier in this Reply Brief, the very first time the Tenth Circuit ruled that Mobil was entitled to judgment of dismissal based upon its reversal for insufficient evidence was in the *Mitchell II* decision. No amount of artful juxtaposition of excerpts from the pleadings in this case can alter this plain fact.

Second, the law of the case doctrine cannot and should not be mechanically applied to shield from Supreme Court review judicial action in conflict with authority of this Court, especially when it would lead, as here, to a manifest injustice and a procedurally improper result. The law of the case doctrine, unlike federal rules of procedure, is not a limit on appellate court power. *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988). Nor can that doctrine ever "bind this Court in reviewing decisions below." *Id.*

Mobil's argument (*Opp. Brief*, 7) that *Fogel v. Chestnutt*, 688 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), cannot be read as holding that conflict with

a prior decision of this Court should preclude application of the law of the case doctrine except where an intervening opinion reaches a contrary conclusion is nonsensical. To suggest the law of the case doctrine can insulate disregard of established precedent but will not have preclusive effect when there is an intervening change in precedent has no basis in logic or fairness.

**C. Mobil's Arguments That 28 U.S.C. § 2106 Appellate Jurisdiction Cannot Be Limited By The Rules Of Civil Procedure And That *Neely* Overruled *Cone* Support Grant--Not Denial—Of The Writ.**

The decision below, in effect, interprets 28 U.S.C. § 2106 as creating unlimited appellate power, unrestricted by the rules of procedure. The rules are somehow negated because § 2106 contains no limitation on an appellate court's power to award relief. Although Mitchell concedes that the source of appellate power in this case derives from Article III of the Constitution and 28 U.S.C. § 1291, the Federal Rules of Civil Procedure operate in several ways as limitations on that power. To suggest otherwise relegates them to the status of window dressing.

As the *Cone* line of cases, including *Neely*, makes clear, appellate courts, on reversal of a judgment based upon insufficient evidence, have no power to order any relief for the verdict loser other than retrial. Just as subject matter jurisdiction cannot exist absent the filing of a complaint with cognizable claims, the power of the appellate court to reverse on insufficient evidence and give judgment to a verdict loser cannot exist unless that party first files a Rule 50(b) motion. To the extent, as Mobil argues, that the court below ruled that its § 2106 power is unrestricted by the rules of procedure, such ruling cries out for examination by this Court.

Throughout its Opposition Brief, Mobil omits mention that in *Neely* a motion for judgment n.o.v. was, in fact, filed. That crucial procedural fact explains why this

Court, consistent with *Cone-Globe-Johnson*, could state in *Neely* that the "grant of appellate jurisdiction to the courts of appeal is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal," (quoted in *Opp. Brief* at 9), and that a new trial request was waived because it was "not raised in the court of appeals or in the petition for writ of certiorari," (quoted in *Opp. Brief* at 12), *Neely*, 386 U.S. at 322 and 329-30. Lifting those quotations out of context of the fact that the verdict loser *did file* a Rule 50(b) motion in *Neely* seriously distorts its holding, a distortion the Tenth Circuit adopted in this case. On the other hand, if *Neely* did overrule *Cone* and its progency, then this Court should so declare. In either instance, the issue is worthy of this Court's consideration.

## CONCLUSION

For the important reasons described in the Petition and in this Reply Brief, petitioner respectfully requests this Court to grant a writ of certiorari to the Tenth Circuit Court of Appeals and schedule this matter for full briefing and argument to explicate and stabilize the *Cone* line of authority and the relationship of the Federal Rules of Civil Procedure to 28 U.S.C. § 2106, or alternatively, due to the clear conflict of the decision below with past decisions of this Court, the Court should confirm the vitality of the *Cone* rule by summary reversal and remand of this case for retrial.

Respectfully submitted,

THOMAS L. ROBERTS
(Counsel of Record)
RODNEY R. PATULA
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 S. Syracuse Way, #400
Englewood, CO 80111
Telephone (303) 771-6200
Facsimile (303) 779-0740
*Counsel for Petitioner*
*Porter H. Mitchell*

DATED this 2nd day of March 1992.